

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of

Vonage Holdings Corporation)	
Petition for a Declaratory Ruling)	WC Docket No. 03-211
Concerning an Order of the Minnesota)	
Public Utilities Commission)	

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission's (Commission) Wireline Competition Bureau Public Notice issued September 26, 2003. The Commission seeks comments on Vonage Holdings Corporation's (Vonage) petition for declaratory ruling. Vonage describes the service it offers as Voice Over Internet Protocol (VOIP) service that permits communications between users of broadband Internet connections and users of conventional telephone services. The Minnesota Public Utilities Commission (Minnesota Commission) required Vonage to comply with state laws governing providers of telephone service, even though Vonage averred that it is a provider of information services and not a telecommunications carrier or common carrier subject to Title II of the Communications Act of 1934 (the Act).¹ Vonage now seeks a Commission ruling preempting the Minnesota Commission's Order. Further, Vonage asks that the Commission find that certain specific E-911 requirements imposed by the Minnesota Commission are in conflict with federal policies.² Finally, Vonage states that preemption is

¹ Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211 (filed September 22, 2003). On October 16, 2003, the Minnesota Commission's decision was permanently enjoined by the United States District Court, District of Minnesota.

² Id., pp. 24-27.

necessary because of the impossibility of separating the Internet, or any service offered over it, into intrastate and interstate components.³

In support of its request, Vonage contends that all of its customers must provide their own computer equipment and dedicated broadband connection to the Internet, and that Vonage performs a net protocol conversion that “bridges” the incompatible formats of the Internet and the public switch telephone network (PSTN). Vonage concludes, under the Commission’s Computer II decision and the two decades of precedent interpreting that decision, that it offers an information service and is not subject to common carrier regulation under Title II of the Act. Vonage contends that the Minnesota Commission seeks to impose common carrier regulation on the intrastate use of its service. The company further avers that Internet communications applications in general were never designed to comply with the legal and technical requirements applicable to fixed switched telecommunications networks, including obligations, such as state 911 requirements, tariff rules, rate regulation, and other forms of regulation typically imposed on common carriers.

The Commission should not entertain Vonage’s request for a declaratory ruling that its IP telephony services are “information services,” not “telecommunications.” The larger issue of whether disparate regulatory treatment of different technologies is appropriate or sustainable in an increasingly competitive market should be addressed in a generic rulemaking. Rather than dealing with questions of jurisdiction on an individual company and service basis, the Commission should initiate a generic proceeding to make a finding on the proper regulatory classification of calls made by means of VOIP technologies. Should the Commission decide to

³ Id., pp. 27-31.

address the merits of Vonage's petition, NYDPS asserts that the current record is insufficient to reach a determination as to whether Vonage is providing an information service.

The Commission has not definitively determined if any form of IP telephony is either telecommunications service or information service.⁴ In its 1998 Universal Service Report to Congress, the Commission observed that information service providers (ISPs) do not appear to be providing telecommunications when users of the ISP's services conduct "computer-to-computer" VOIP calls.⁵ In the same Report, however, the Commission opined that "phone-to-phone" VOIP telephony services appear to lack "the characteristics that would render them 'information services' within the meaning of the statute, and instead are 'telecommunications services.'"⁶ The Commission deferred definitive resolution of these issues pending development of a fuller record. The allegations contained in Vonage's petition for declaratory ruling are insufficient for determining whether its service meets the Act's definition of information service, particularly considering the specific exemption in the criteria for the use of the capabilities for the operation of a telecommunications service.

⁴ The Commission has asserted jurisdiction over "enhanced" or "information services" and exempted such services from state regulation. The Telecommunications Act of 1996 defines "information service" as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.
(47 USC §153(20))

⁵ In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), 13 FCC Rcd 11501, released April 10, 1998, ¶ 87 (Universal Service Report).

⁶ Id. at ¶ 89. Telecommunications services are subject to both state and federal regulation.

Since the release of the Universal Service Report, the Commission has received three petitions for declaratory rulings on the nature of particular services that make use of the Internet, or Internet technologies, including the instant petition.⁷ In addition to these Commission proceedings, the New York Public Service Commission has acted on a complaint concerning appropriate charges for “phone-to-phone” IP telephony calls⁸ and is in receipt of a complaint against Vonage Holdings Corp. by Frontier Telephone of Rochester, Inc.⁹ The New York Public Service Commission issued a Notice Requesting Comments on October 9, 2003, in order to evaluate claims in the Frontier complaint that Vonage is providing telephone service in New York State without complying with the New York Public Service Law and Commission regulations. The appropriate classification of VOIP service transcends the specific circumstances of Vonage’s request.

CONCLUSION

For the above reasons, NYDPS urges the Commission to reject Vonage’s request for a declaratory ruling. The larger issue of whether disparate regulatory treatment of different technologies is appropriate or sustainable in an increasing competitive market should be addressed in a broader proceeding. The NYDPS recommends that, rather than dealing with

⁷ In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361 (filed October 18, 2002) and Petition for Declaratory Ruling that pulver.com’s Free World Dialup is neither Telecommunications nor a Telecommunications Service, WC Docket No. 03-45 (filed February 5, 2003). NYDPS filed its comments in WC Docket No. 02-361 on December 18, 2002.

⁸ Case 01-C-1119, Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges, Order Requiring Payment of Intrastate Carrier Access Charges (issued May 31, 2002).

questions of jurisdiction on an individual company and service basis, the Commission initiate a generic proceeding on the proper regulatory classification of VOIP. In the alternative, the Commission should find that it has insufficient information to determine if Vonage's service meets the definition of "information service."

Respectfully submitted,

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⁹ Case 03-C-1285 - Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holding Corp. Concerning Provision of Local Exchange and Inter-Exchange Telephone Service in New York State in Violation of the Public Service Law, filed September 10, 2003.